



Fagen Friedman & Fulfrost LLP

CHANGING THE BURDEN OF PROOF FOR DUE PROCESS

“Lunch and Learn”

May 30, 2024

**Presented by:
Jonathan P. Read**

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Biography

Jonathan P. Read's practice focuses on student-related and special education law. A highly respected attorney with an outstanding reputation for helping build legally compliant, student-focused programs, Jonathan has successfully delivered comprehensive special education training throughout the state.

Jonathan represents school districts and other educational agencies in all facets of due process and disciplinary proceedings under the IDEA and Section 504. He is admitted to practice in California, the U.S. District Court for the Southern, Central, and Eastern Districts of California, and has appeared on multiple occasions before the Ninth Circuit Court of Appeals. He represented the National School Boards Association as *amicus curiae* in the seminal U.S. Supreme Court case, *Endrew F. v. Douglas County School District*.

A popular speaker, Jonathan is frequently requested to present before the Association of California School Administrators, the California School Boards Association, and at national events sponsored by LRP. His article entitled "Access to Achievement: The Changing Landscape of FAPE" appeared in the Summer/Fall issue of *Urban Perspectives*. (Vol. 15, No. 2.) Jonathan has also developed specific expertise in representing school districts in matters involving English language learners. Jonathan co-authored the book *ELLS With Disabilities: A Guide to Leading Assessment and Intervention* for LRP Publications.

Jonathan serves as an adjunct professor at the University of San Diego School of Law, where he teaches all aspects of education law, including labor and employment, school governance, charter schools, and constitutional issues facing students.

Jonathan's professional career in education began as a one-to-one aide for students with severe disabilities and as an ELL aide in the San Diego Unified School District. He subsequently taught elementary school in the Poway Unified School District. He received his Juris Doctor from the University of California, Los Angeles School of Law. He received his bachelor of arts degree in music and his multi-subject teaching credential from the University of California, San Diego.

After School

Music has always been a big part of my life. Growing up with a dad who was a guitarist, I learned how to play that instrument myself and also studied music as an undergrad. I enjoy many genres, including jazz, rock and classical.


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Changing the Burden of Proof for Due Process

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What We'll Cover . . .

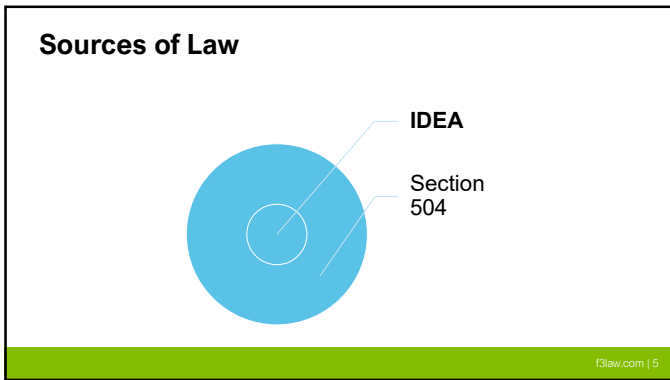
- Background and Overview
 - Legal Standards for FAPE
- The Due Process Hearing
 - IDEA and Schaffer v. Weast Decision
- Senate Bill 5883
 - History
 - Provisions
- Potential Impact of Senate Bill 5883 on Public School Districts in Washington

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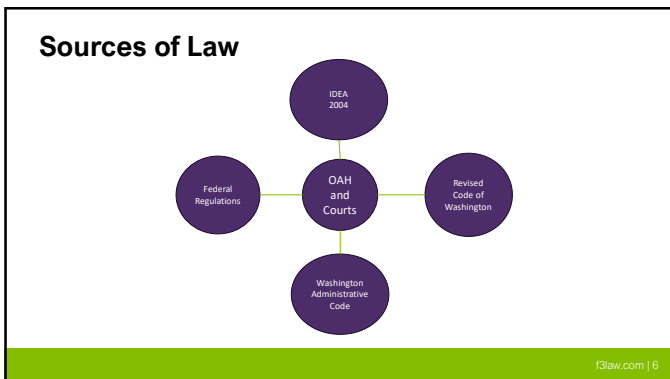
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Background and Overview

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The 9th Circuit



Geographic Boundaries
of the United States Circuit of Appeals for the Ninth Circuit

- Decisions are binding in:
 - Alaska
 - Arizona
 - California
 - Hawai'i
 - Idaho
 - Montana
 - Nevada
 - Oregon
 - Washington
 - Guam
 - Northern Marianas

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The Rowley Standard

- Two-prong test for determining whether a student was offered FAPE.
 - **Procedural:** Has the district complied with the procedures set forth in the IDEA?
 - **Substantive:** Is the IEP reasonably calculated to enable the student to achieve passing marks and advance from grade to grade?

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Procedural Compliance: Target Range (Now IDEA 2004)

1. Impeded right to FAPE
2. Significantly impeded parents' right to meaningfully participate in the decision-making process
3. Caused educational deprivation

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**Substantive Compliance:
The Rowley FAPE Standard**

- 1983 Supreme Court decision used phrase “some educational benefit” as standard for evaluating whether school district has complied substantively with IDEA
- Rowley decision expressly declined to adopt more specific test for determining adequacy of educational benefits provided under a given IEP

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Andrew F.

- U.S. Supreme Court (2017)
 - Reversed 10th Circuit’s decision
 - In order to meet their substantive obligations to provide FAPE under IDEA, school districts must offer IEPs that are “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”

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Andrew F.

- Court declined to establish any “bright-line” standards for IEPs
 - “The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created”
 - Goals must be “appropriately ambitious”
 - Court: Absence of such bright-line rule should not be mistaken for “an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review”

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“By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances”

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The Legal Elements of the LRE

- To the maximum extent appropriate, children with disabilities are educated with children who are not disabled.
- Removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. §1412(a)(5).

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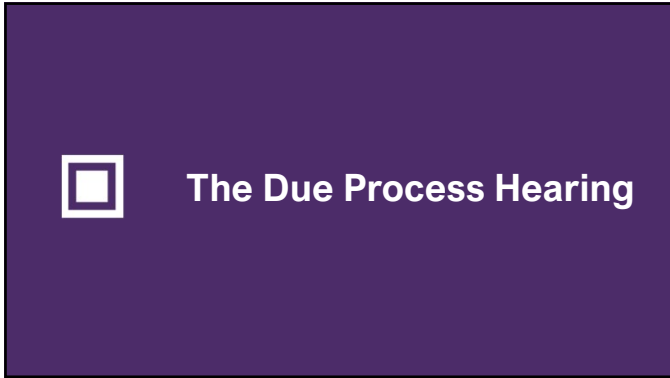
Implementation: Van Duyn v. Baker School Dist. 5J

“A material failure to implement an IEP occurs when the services a school provides to a disabled child fall significantly short of the services required by the child’s IEP.....”

(Van Duyn v. Baker School District 5J (9th Cir. 2007) 481 F.3d 770)

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The Due Process Hearing

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The Due Process Hearing

- Similar to court trial, but less formal
- Technical rules of evidence and those related to witnesses do not apply
- Designed so that proceedings and rules are easily understood by lay people
- Testimonial and documentary evidence is presented and entered into a "record"
- ALJ renders an informed decision based on evidence

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The Due Process Hearing (cont'd)

- Written request for a due process hearing must be submitted within two years of when parent or district knew or should have known about the alleged action
- When parent requests due process hearing, district must convene a resolution meeting within 15 days for purpose of discussing facts and resolving dispute
- If parties are unable to resolve dispute within 30-day resolution period, then due process hearing must be scheduled and a final decision must be issued within 45 days, with some exceptions

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Issues at Due Process

- What issues may be addressed in a due process hearing?
 - Disagreements with regard to the identification, assessment, or educational placement
 - Disagreements regarding the provision of a FAPE

34 C.F.R. § 300.507

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What Is the “Burden of Proof”

Burden of Persuasion
+ Burden of Production
Burden of Proof

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“Burden of Persuasion” and “Burden of Production”

- **Burden of persuasion** = determines who loses if the evidence is closely balanced
- **Burden of production** = which party must produce evidence

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What Is the “Burden of Proof” for Due Process Hearing



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Which Party Has Burden of Proof at Due Process Hearing – IDEA History

- IDEA statute and regulations are silent as to how burden of proof is to be allocated
- Supreme Court stepped in with decision in Schaffer v. Weast (2005)

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Schaffer v. Weast (2005)

Background

- 4th Circuit determined that parents of seventh-grader with learning and speech-language disabilities bore burden of proving student’s IEP was inadequate
- Although district court had awarded parents with reimbursement for their unilateral placement of the child in private school, 4th Circuit reversed, deciding there was no reason to depart from general rule of allocating burden of proof to the party seeking relief
- Parents appealed burden of proof issue to U.S. Supreme Court

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Schaffer v. Weast (2005)

SCOTUS Ruling

- Supreme Court agreed with 4th Circuit
- Because IDEA is silent on allocation of burden of persuasion, Court relied on “default rule” that party bringing the legal challenge bears such burden
- Court reasoned that because IDEA requires that district’s IEP be retained during dispute with parents as stay-put placement, “Congress appears to have presumed” that if parties have complied with IDEA’s procedural obligations, parents will prevail when they have “legitimate grievance”

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Schaffer v. Weast (2005)

SCOTUS Ruling

- Court found parents’ argument that injured party should not have to prove “facts peculiarly within the knowledge of his adversary” was not substantiated by IDEA
- Because IDEA provided for means for parents to challenge district with all of necessary evidence and expert testimony, knowledge about student’s education was not solely within the purview of district
- Further, since IDEA provided for flexible and informal hearings, Court found that districts “bear[] no unique informational advantage”
- But Court refused to decide whether states may override the default rule through legislation; here, because Maryland did not have a statute that assigned burden to either party, it was not an issue properly before the Court

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Deferral to State Law

- Some state statutes do not address burden of proof, implicating decision in Schaffer v. Weast
- Some state statutes explicitly state, in accord with Schaffer v. Weast, that party initiating due process hearing bears burden of proof
- But minority of state legislatures have shifted burden of proof to school districts, regardless of which party initiated complaint
 - Prior to SB 5883, six states place burden of proof on school districts: Connecticut, Delaware, Florida, New Jersey, Nevada, and New York

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SB 5883 – What Does It Say?

- Subsection 1: Except as provided in subsection (2), “the school district has the burden of proof, including the burden of persuasion and production, whenever it is a party to a due process hearing regarding the identification, evaluation, reevaluation, classification, educational placement, disciplinary action, or provision of a free appropriate public education for a student with a disability”

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SB 5883 – What Does It Say?

- Subsection 2: “A parent or person in parental relation seeking tuition reimbursement for a unilateral parental placement has the burden of proof, including the burden of persuasion and production, on the appropriateness of such placement”

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SB 5883 – Exception Under Subsection 2

- Under the IDEA, there are several ways student with a disability may be placed in private school, and public school's responsibilities to cover cost of student's tuition vary depending on type of and reason for placement
 - If student is placed in private school by public school as a means of providing FAPE, public school must cover full cost of tuition
 - If parents unilaterally place student in private school because public school fails to provide student with FAPE, public school may be required to reimburse parents for private school tuition if ALJ or court finds that public school had not made FAPE available to student in timely manner prior to private school enrollment and if private placement is appropriate

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SB 5883 – What Does It Say?

- Subsection 3: "The burden of proof in this section must be met by a preponderance of the evidence" (i.e., to prove that something is more likely than not)

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Potential Impact of SB 5883 on Public School Districts in Washington

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Differing Viewpoints . . .

- Supporters of SB 5883 believe shifting burden of proof will encourage parties to settle earlier, before dispute gets to hearing
- Supporters of SB 5883 believe districts will conduct more careful analysis of potential due process claims, recognizing that their chances of success might not be as good as under previous law

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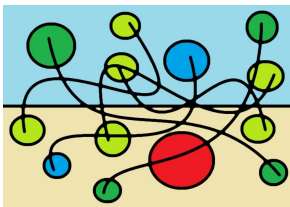
Differing Viewpoints . . .

- Critics of SB 5883 are concerned that it may encourage more litigiousness
- Critics of SB 5883 believe new law will not provide better services for students and that districts' focus should be on curriculum

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814 Federal Monitoring Requirements?



A New Era: Revitalizing Special Education for Children and Their Families, July 1, 2002, at 12, President George W. Bush's Commission on Excellence in Public Education

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Who hears your cases?



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2 Rules of Thumb

1. All communication (verbal and written) must be child-centered; and
2. Consider, consider, consider... but then give the child the professional recommendation that he/she deserves

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For Districts, Due Process Strategies Remain the Same . . .

- Sources of relevant information
 - District assessors
 - District service providers
 - District general education teachers
 - Third-party assessors
 - Third-party service providers
 - Expert witnesses

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For Districts, Due Process Strategies Remain the Same . . .

- Consider
 - District assessments
 - Private assessments
 - Goals
 - Teacher’s classroom records
 - Service provider logs
 - Health records
 - Discipline records
 - Attendance records

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Questions:

- How do you prove unique circumstances?
- How do you provide a “cogent and responsive” explanation?

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Required Perspective

“Actions of the school systems cannot . . . be judged exclusively in hindsight . . . [A]n individualized education program (“IEP”) is a snapshot, not a retrospective”

Adams v. State of Oregon (9th Cir. 1999)

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5 Dots to Connect

- Present levels
- Areas of Educational Need
 - For which special education is required
 - Maybe related services
- Goals
- Placement (Special Education)
 - Supplementary Aids and Services
- Supports for General/Special Education
 - Related Services
 - Supplementary Aids and Services
 - Accommodations/Modifications

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Assessments

1. Records & Products
2. Interviews
3. Observations
4. Tests

-Each data source has unique strengths and flaws
 -Best when used to cross validate each other

Brian P. Leung, Ph.D., Considerations for Best Practice for School Psychologists, 2019.

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Data Review

1. Standard/scaled scores over time
2. Review classroom work over time
3. Review progress reports/report cards
4. Review behavioral records/reports
5. Classroom observations; multiple sessions
6. Unstructured activities; playground observations/social settings/transitions
7. Interview teacher
8. Interview parent
9. Interview other service providers

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The IEP

- Present levels
- Goal
- Goals reporting periods

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Line Up Your IEPs

- Do they illustrate an upward trajectory, downward trajectory, or flatlining?
 - Present levels pages
 - Goals



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Goals and Goal Reporting

Goals provide "a mechanism for determining (1) whether the anticipated outcomes for the child are being met (i.e., whether the child is progressing in the special education program) and (2) whether the placement and services are appropriate to the child's special learning needs." (Letter to Hayden (OSEP 1994) 22 IDELR 501)

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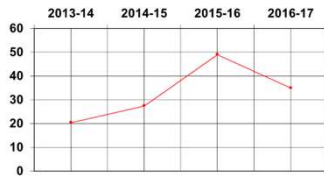
Goals and Goal Reporting

Goals are intended to determine, over a 12-month period, "whether the totality of services provided pursuant to the student's IEP – including special education, related services, and supplementary aides and services – is appropriate to the student's unique needs." (Letter to Smith (OSEP 1995) 23 IDELR 344; Letter to Butler (OSERS 1988) 213 IDELR 118)

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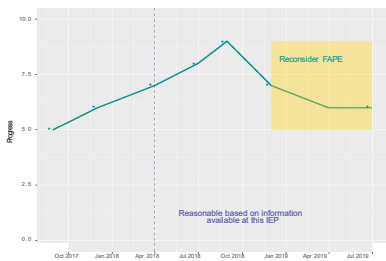
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School Year



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Quarterly Progress Example
FAPE is based on a snapshot of progress at the time of the IEP



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For Districts, Due Process Strategies Remain the Same . . .

- Practical Strategies (cont'd)
 - Create case chronology
 - Create “case-at-a-glance”
 - Synopsis of facts
 - Analysis of issues
 - Theory of case
 - Strengths and weaknesses
 - Look toward next steps
 - Identify gaps in information

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For Districts, Due Process Strategies Remain the Same . . .

- Practical Strategies (cont'd)
 - Actions to strengthen case pre-hearing
 - Send clarifying letter, if needed
 - Unsigned IEP or to correct typos and administrative errors
 - Convene IEP team meeting, if needed
 - Can address complaint-related issues
 - Annual IEP due?
 - Send request to assess, if needed
 - Address IEP implementation issues

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For Districts, Due Process Strategies Remain the Same . . .

- Practical Strategies (cont'd)
 - Evaluating district’s position
 - Substantive case analysis
 - Evaluate from parents’ perspective
 - Settlement vs. proceeding to hearing on merits
 - Cost-benefit analysis
 - What is in student’s best interest is always foremost!
 - Financial considerations
 - Relational considerations (student, parents, staff, school board, community)

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Practice Pointer

Communicate in a manner that your grandmother could understand!



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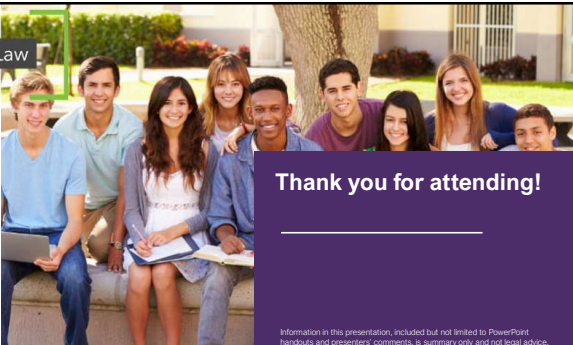
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Questions?

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Thank you for attending!

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